UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

MASHANTUCKET PEQUOT GAMING ENTERPRISE d/b/a FOXWOODS RESORT CASINO [1[1]] Employer and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 30, AFL-CIO Petitioner	Case No. 34-RC-2251

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, and the briefs of the parties, I find that: the hearing officer's rulings are free from prejudicial error and are hereby affirmed; the Employer is engaged in commerce within the meaning of the Act; the labor organization involved claims to represent certain employees of the Employer; and a question affecting commerce exists concerning the representation of certain employees of the Employer.

The Petitioner seeks to represent a unit of approximately 310 full-time and regular part-time employees in the engineering, facilities, projects, interior landscaping and engineering apprenticeship departments employed by Foxwoods Resort Casino located in Mashantucket, Connecticut (herein referred to as Foxwoods or the Employer). Foxwoods, which is owned by the Mashantucket (Western) Pequot Tribe (herein called the Tribe), is located on the Tribe's reservation. The reservation consists of 1,600 acres of land held in trust by the United States Government, in

[1[1]] The Employer's name appears as amended at the hearing.

perpetuity, for the benefit of the Tribe. Although otherwise in accord as to the scope and composition of the petitioned-for unit, the Employer, contrary to the Petitioner, contends that the Board is precluded from asserting jurisdiction in this matter because doing so would constitute an impermissible infringement on the Tribe's federally recognized status as a sovereign nation. According to the Employer, such status includes an inherent right to enact laws to regulate employment and labor relations for any of its ventures that function to benefit the Tribe.

On October 24, 2007, in a prior case involving the Employer and International Union, UAW, AFL-CIO (*Foxwoods Resort Casino*, Case No. 34-RC-2230), the undersigned issued a Decision and Direction of Election (DDE) in a unit composed of Foxwood's licensed poker, table game, and dual rate dealers. In the DDE, I found no merit to the Employer's contention that the Board lacked jurisdiction over Foxwoods and concluded that it would effectuate the policies of the Act to assert jurisdiction therein. By Order dated November 21, 2007, the Board denied the Employer's Request for Review of the undersigned's DDE. The parties herein have agreed to incorporate the transcripts and exhibits from Case No. 34-RC-2230 into the instant case. At the hearing in the instant matter, the Employer also proffered certain additional evidence, without objection, in support of its assertion that the Board is precluded from asserting jurisdiction over its operations. [2[2]]

For the reasons set forth below, I find that the application of the Board's decision in *San Manuel Indian Bingo & Casino,* 341 NLRB 1055 (2004), aff'd. 475 F.3d 1306 (D.C. Cir. 2007)(herein called *San Manuel*), warrants the assertion of jurisdiction over the Employer in the instant case.

I. FACTS

A. Foxwoods Operations

Foxwoods is the largest casino complex in the world, covering over one million square feet on the Tribe's reservation, with several hundred thousand square feet utilized solely for gaming purposes. Foxwoods is open to the public 24 hours a day,

---

[2[2]] It does not appear, and the Employer has not claimed, that the proffered evidence is newly discovered and previously unavailable since the hearing in the previous case, or that there are changed circumstances. However, inasmuch as the evidence was admitted without objection, it is unnecessary to determine whether such additional evidence was otherwise admissible.

365 days a year, attracting 12 million customers every year and generating annual income in excess of one billon dollars. Its gaming ventures include 7,000 slot machines, about 400 gaming tables, and the world's largest bingo hall. Its non-gaming operations include three on-site hotels, about 30 eating and drinking establishments, three to four venues for live entertainment, and many retail shops. [3][3] Many of the bars, restaurants and retail stores at Foxwoods are run by private enterprises that have a lease agreement with the Tribe; others are owned and operated by the Tribe, presumably through the Employer. The Tribe markets Foxwoods to diverse segments of the population throughout the Northeast. Less than one-tenth of one percent of Foxwoods' patrons are tribal members. Although Chairman Thomas testified that "there are traditional gaming aspects to our culture", he admitted that none of those "traditional games" are played at Foxwoods.

The Employer's day-to-day operations are managed by President John O'Brien, who is not a tribal member. O'Brien reports directly to Tribal Council Chairman Michael Thomas. [4][4] Out of the approximately 9,000 employees employed at Foxwoods, only about 30 are tribal members, mostly occupying managerial positions. None of the petitioned-for employees are tribal members. Among the senior management, including Vice Presidents and Senior Vice Presidents, only one is a member of the Tribe. The senior members of management report directly to O'Brien. The Employer has no Board of Directors. The Tribal Council selects the Employer's top-level managers, establishes its budget and enacts its employment policies.

The Employer's gaming authority is derived from a "Compact" between the Tribe and the United States Secretary of the Interior, in accordance with the Indian

---

[3][3] The Foxwoods' gaming, lodging and entertainment operation is presently undergoing an expansion on tribal lands through the construction of MGM at Foxwoods, which is owned and operated by the Tribe through a licensing agreement permitting it to use the MGM brand name. It is expected to open for operations in May 2008. The Tribe's off-reservation gaming interests, operated by the Foxwoods Development Company, includes the construction and operation of a casino in Philadelphia, Pennsylvania, and the construction and management of a casino for the Pauma Band of Mission Indians in California.

[4][4] As discussed in more detail below, the Tribal Council is the seven-member governing body of the Tribe, whose members are elected by the Tribe's 900 members.

Gaming Regulatory Act (IGRA). The Tribe's internal gaming regulating body is called the Mashantucket Pequot Tribal Gaming Commission (herein called the Gaming Commission). The Gaming Commission was established by the Tribal Council to:

> provide for the sound regulation of all gaming activities on lands within the jurisdiction of the Mashantucket Pequot Tribe, in order to protect the public interest in the integrity of such gaming activities, to prevent improper or unlawful conduct in the course of such gaming activities, and to promote the development of a balanced tribal economy by dedicating all of the net revenues from such gaming activities to the public purposes of the Tribe.

The Gaming Commission consists of five members appointed by the Tribal Council Chairman, with the advice and consent of the Tribal Council. Three of the five Gaming Commission members must be Tribal members.

The Gaming Commission monitors the Employer's compliance with all "Gaming Procedure", "Standards of Operation and Management (SOMs)", Tribal laws and any other applicable laws, and may impose corrective action, fines or other sanctions "as empowered by the Gaming Procedures and Tribal Law". This includes the authority to bar persons from the gaming premises because of their "criminal history or association with criminal organizations". The Gaming Commission works closely with the "Tribal Internal Audit", "Tribal Surveillance", "Tribal Police" and the Tribe's "Inspector General"s Office". It also interacts daily with the State of Connecticut Department of Special Revenue, which licenses all gaming employees in the State. The Gaming Commission employs 27 inspectors. The inspectors are present at all times in the Employer's casino, and have unfettered access to all areas of the gaming facility at all times. They observe the counting of money, monitor the play at the gaming tables and slot machines, and assist in the review of the Employer's adherence to all applicable Tribal, State and Federal gaming standards. The Gaming Commission also has a "Compliance Division", which reviews the gaming operation process, including the introduction of new games in order to develop effective SOMs, and a "Licensing Division" that oversees the State gaming license intake process and the background reviews and licensing of non-gaming employees and vendors.

According to Chairman Thomas, approximately 98% of the Tribe's revenues are derived from the Employer's operation of Foxwoods, which is used to fund various endeavors aimed toward promoting the Tribal community and Tribal self-government, including government, culture, health and welfare, housing, education, safety, repatriation and other business ventures, both on and off the reservation.

B. Tribal Operations

1. Tribal Governance

Although the Tribe does not have a treaty with the Federal government, [5][5] it was officially recognized as a tribe by the Federal government in 1983. The Tribe's Constitution and By-Laws, originally enacted in 1970, establishes the Tribal organization and sets forth its governance structure. It provides for the creation of a seven-member Tribal Council elected for staggered three-year terms at the annual meeting of the Tribe. The Chairman and Vice Chairman of the Tribal Council are selected by a vote of the Tribal membership.

The Tribal Council is vested with the authority to create committees and appoint or employ officers to staff those committees as deemed necessary. These committees are subordinate to the Tribal Council, which delegates the committees' authority at its own discretion. Such committees may be standing, regular, or ad hoc. Standing and regular committees are comprised of Tribal members only, together with a Tribal Council member, the total number of committee members differing depending upon whether it is a standing or regular committee. The Tribal Council governs primarily through the passage of resolutions by majority vote. While a resolution may be passed by the committees, it is required to be ratified by the Tribal Council before it is enacted as Tribal law. When Tribal legislative matters have the potential to impact the Tribe as a whole, its passage may be subject to a ratification process.

There is also an Elders Council that comprises another aspect of the governmental structure. The Elders Council has two areas of authority: determining

---

[5][5] See *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2nd Cir. 1996).

Tribal membership; and banishing non-Tribal members. Banishments are not reviewable by the Tribal Council.

The preamble to the Constitution and By-Laws states that the purpose for establishing the Tribe and its governmental authorities is "to conserve and develop our common resources and to promote the welfare of ourselves and our descendents…." In apparent furtherance of these objectives, a host of committees have been authorized by the Tribal Council, including Natural Resource Protection; Economic Development; Community Planning; Education; Finance; Housing; Administrative Support; Parks & Recreation; Judicial; Public Safety; Health & Human Services; and Historical & Cultural Preservation. All funding for the committees comes through Tribal Council resolutions.

The Tribe also operates a variety of administrative departments for the advancement of Tribe members' health, safety, education and prosperity, and in furtherance of its interest in self-governance. These include the Career Development and Succession Planning Department; the Child Development Center; Child Protective Services; Cultural Resources Department; Department of Education;[6][6] Department of Fire and Emergency Services; Department of Housing; Department of Interior; Tribal Procurement; Human Potential Development; Building Management Department; Office of Inspector General; Office of Land Use/TOSHA Commissioner;[7][7] Office of Legal Counsel; Office of Natural Resource Protection; Parks and Recreation; Peacemakers Council; Police Department; Public Affairs Department; Public Relations Department; Records Management Department; National and State Governmental Affairs Offices (located in Hartford, Connecticut and

---

[6][6] The Tribe provides education to its members up to the first grade, as licensed by the State of Connecticut. After completing the education offered by the Tribe, many of the Tribe's members attend public school in the nearby town of Ledyard.

[7][7] The acronym "TOSHA" stands for the Tribal Occupational Safety and Health Act. The Employer proffered a "Resolution", adopted by a majority vote of the Mashantucket Tribal Council in March 1998, which approved the enactment of TOSHA. According to the Tribe's Annual Report, the TOSHA Commissioner's office was established after the 1996 decision in *Reich v. Mashantucket Sand & Gravel*, supra, where the court found that the Federal Occupational, Health and Safety Act applied to the Tribe. The Tribal Council Resolution that appointed the TOSHA Commissioner states, inter alia, that the Tribe adopted "the applicable standards and regulations of the Federal Occupational Safety and Health Administration as Tribal standards to be enforced on all Reservation and trust properties . . . ."

Washington, D.C.); Tribal Clerk's Office; Tribal Health Services; Tribal Internal Audit; Tribal Manager's Office; and Utilities Department. These administrative departments are funded through Tribal Council resolutions and are, for the most part, located on the reservation.

The Department of Fire and Emergency Services is involved in off-reservation activities as well, as it has contracts with local non-tribal businesses to provide emergency medical services, and often provides fire safety assistance to surrounding non-tribal communities. Although the Tribe maintains its own Police Department, the record indicates that the Connecticut State Police also has some undefined jurisdictional role with regard to Foxwoods. All tribal police officers are also officers with the BIA and receive their training at the BIA academy.

As noted above, approximately 98% of the Tribe's revenues are derived from the Employer's operation of its casino, which includes the rental fees from the various food, drink and retail vendors who operate independent businesses within the Foxwoods' complex. [8[8]] All such revenues are utilized for funding the Tribe's governmental operations described above. However, such revenues do not flow directly to the Tribe. Rather, because Foxwoods is located on lands held in trust for the Tribe by the United States Government, those lands and the structures upon them cannot be mortgaged. As a result, the Tribe created a collateral mechanism, described as a "waterfall" operation, by which all of the net revenue from the operation of Foxwoods (after deducting for budgeted operating expenses and payments to the State of Connecticut) are deposited into bank accounts held and administered by independent trustee banks. The net revenue flowing into each bank account is then available to fund debt service accounts for the benefit of the Tribe's creditors in a specified order of priority. More specifically, all revenues are first deposited in a commercial bank in the name of King Huat (KH), the lender that provided the original loans for the construction of Foxwoods. KH pays out budgeted

---

[8[8]] The remaining revenue comes from profits generated by the Tribe's other non-gaming enterprises and commercial properties, Federal funding and taxes. In this regard, the Tribe's Annual Report reveals that the Bureau of Indian Affairs (BIA) provided the Tribe with $755,193.00 in fiscal year 2006. With regard to taxes, the record reflects that pursuant to Title XVI of the Tribal Laws, the Tribe imposes and collects sales taxes on certain business operations on the Tribal reservation, including hotels, food and beverage, retail, and admissions, along with a property tax on Tribal "homeowners".

operating expenses and reserves in accordance with the Employer's approved budget, takes what is owed to it (currently the principal amount of $21 million), and then pays the remaining net revenue to a trustee for the benefit of a syndicate of bank lenders under a revolving credit facility (referred to as "bank debt"). The "bank debt" provides the Tribe with the ability to draw up to $700 million for general business needs, including the construction of additional gaming facilities. This second level of "bank debt" currently stands in the principal amount of $400 million. After the second level of payments are made, the remaining money flows to a trustee who is responsible for paying note obligations issued pursuant to special revenue obligation bonds. This third level of principal debt currently stands at $637 million. After the third level of payments are made, the remaining money flows to another trustee who is responsible for paying note obligations issued pursuant to subordinated special revenue obligation bonds. This fourth level of principal debt currently stands at $304 million. When those payments are made, the remaining money flows to another trustee who is responsible for paying obligations on various short-term notes. The record does not reflect the amount of this fifth level of debt. After those payments are made, all remaining money is deposited into an account in the name of the Tribe, which may then utilize all or a portion of such money for its governmental obligations described above. Here, too, the record does not indicate the amount of money available for this purpose or the amount spent on Tribal governance.

The Employer claims that if a default were to occur at any level of the "waterfall", cash flow would no longer be transferred out of the applicable accounts and would instead be collected for the benefit of the creditors at that level. In this regard, both the special revenue obligation bonds and the subordinated special revenue obligation bonds provide for the distribution of $5 million per month for three months upon the occurrence of an "Event of Default" specifically to support Tribal government functions. There is no evidence, however, that there has ever been a default at any level of the "waterfall".

The Tribe's non-gaming enterprises and commercial properties are governed by the Tribal Business Advisory Board. Such enterprises include the Hilton Mystic Hotel; the Spa at Norwich Inn; Lake of Isle Golf Course; and a resort in St. Croix.

While these enterprises are located off tribal land and are profit generating, funds for such ventures are supplied through Tribal Council resolutions. The record does not reflect the amount of revenues flowing to the Tribe from such business ventures. The Tribe also operates two managed care pharmacies that are located on tribal land for the exclusive use of the Tribe and its employees. It also provides third-party claims administration services to Foxwoods, other Native American tribes, other employers and unions for medical, pharmacy, dental and vision benefit plans. These services include "provider network management, claims adjudication, utilization review and utilization management, as well as case management." Here too, the record does not reflect the amount of revenues flowing to the Tribe from providing these health benefit administration services to other entities. According to the Tribe's Annual Report, Federal HIPAA regulations apply to the operation of these health benefit administration services.

2. Tribal Law and Judicial Procedures

The Employer relies upon its Tribal laws and judicial procedures in support of its claim that the application of the National Labor Relations Act would interfere with its tribal sovereignty. In this regard, the Mashantucket Pequot Tribal Court (herein called the Tribal Court) was established in about 1992. It is located on the reservation and hears "civil disputes that arise within the Mashantucket community." The Tribal Court also hears criminal cases involving "Native Americans" who are accused of violating "the nation's laws while on the reservation." Criminal activity involving non-Native Americans are filed in the Connecticut Superior Court in New London, Connecticut. The Tribal Court's authority and processes are set forth in Title I of the Tribal Laws, which are in essence Tribal statutes. The bound volume of Tribal Laws and the 2007 Supplement include substantive provisions dealing with such matters as tort claims, gaming, family relations, traffic safety, public safety, probate and land usage, as well as Tribal Court Rules, Rules of Evidence, Rules of Civil Procedure, Rules of Appellate Procedure and a Code of Professional Conduct. In criminal matters, jury trials are mandated, whereas in civil matters jury trials are at the discretion of the Tribal judiciary. Juries are composed exclusively of Tribal members. Many of these Tribal Laws draw heavily from established Federal and State law.

The Tribal Court Chief Judge is Thomas Weissmuller, who is not a Tribal member. There are five other judges, with three judges on the trial side and three on the appellate side. The Tribal Court also employs a Bailiff, Administrative Assistant, Director of Probation and Pretrial & Family Investigative Services, and Judicial Clerk. All Tribal Court employees' salaries, as well as the operation of the Tribal Court itself, are financed through Tribal Council resolution.

The Tribal Court hears about 300 cases per year, primarily consisting of tort cases involving Foxwoods' patron "slip and fall" claims; construction contract litigation involving various non-Tribal contractors working on the reservation; and domestic cases involving Tribal divorces, child custody and support enforcement. About 30 cases on the Tribal Court's docket each year are appeals from Tribal administrative bodies involving adverse employment actions filed by both Tribal member and non-Tribal member employees.

3. Tribal labor and employment laws and policies

Tribal laws provide a procedural review of disciplinary action (defined as termination or suspension of five days or more) issued against Tribal and non-Tribal member employees. The "Board of Review" policy was adopted in April 1994 in order to provide a "hearing before an impartial panel of peers to eligible employees whose employment was terminated or suspended for 5 or more days." The Board of Review panel consists of 5 employees who are randomly selected for each case from all of the Employer's departments. However, panel members are never from the same department as the employee requesting the Board of Review.[9[9]] A representative of the Employer's Employee Relations Department serves as "moderator and facilitator" at the Board of Review hearing. The record before the panel consists of all documentation surrounding the disciplinary action, all other discipline, evaluations and commendations, supplemented by any testimony and other information proffered by the parties at the hearing. After the hearing, the panel

---

9[9] By policy effective June 5, 2006, applicable only to Foxwoods' employees, the composition of the "Board of Review" was modified so as to include "(3) hourly Team Members and (2) salaried Team Members, and the panel applicable to supervisors who receive disciplinary action became "(3) salaried Team Members." The Board of Review for Tribal employees is differently composed from that of the Board of Review for Foxwoods' employees.

makes findings of fact and an "advisory" recommendation to the Employer's President/CEO, who then reviews the record and renders a "Final Decision". Although this decision may be appealed to the Tribal Court, the Tribal Court's scope of review is limited to "whether an Employee's procedural due process rights were violated".

The Tribal Council has enacted various other employment policies, many of which appear to apply only to the Employer's operation of Foxwoods. These policies include Sexual and Other Harassment, Family Medical Leave, Wages & Overtime, Equal Employment Opportunity, Indian Preference, and ERISA. There is also a Workers' Compensation Code that was enacted in 1997. Employees covered under this code are defined as "any person who has entered into or works under any contract of service or apprenticeship with the employer." The "employer" is defined as "the Mashantucket Pequot Tribal Nation, its enterprises, governmental divisions or departments thereof …." It is unclear whether this provision applies to employees in the petitioned-for unit, as there is no evidence that they have "entered into or work under any contract of service" with the Employer. There is also a Right to Work provision that was enacted in 2005, which prohibits the compulsory payment of dues to any labor organization. The Right to Work provision was amended on July 13, 2007 to, among other things, change the definition of employee to "any individual employed by an Employer", and to define the Employer as including the Tribe and its enterprises.

In July 2007, the Tribal Council enacted the Mashantucket Employment Rights Law (herein called MERL). MERL provides for the formation of the Mashantucket Employment Rights Office Commission (herein called MEROC), which is composed of five commissioners: one tribal member and two non-tribal members, and two alternates (one tribal member and one non-tribal member). Non-tribal members are appointed by majority vote of the Tribal Council. At the time of the hearing in Case No. 34-RC-2230, MEROC was not yet operational because it had not been fully staffed. Other than procedural provisions regarding the establishment of MEROC and granting it the authority to issue decisions and remedies, there are no substantive provisions contained in MERL.

On August 16, 2007, the Tribe enacted the Mashantucket Pequot Labor Relations Law (herein called MPLRL). Chapter 1, Section 2 of MPLRL states that it was adopted "based on the recent reversal of 30 years of precedent by a federal agency and a federal court, [and because] the Tribe acknowledges that labor organizations may seek, and at least one is currently seeking, the right to represent tribal employees pursuant to federal law, commonly known as the National Labor Relations Act ("NLRA") 29 U.S.C. [Sections] 151-169." Chairman Thomas admitted that the labor organization referenced in this provision was the Petitioner in Case No. 34-RC-2230.

The MPLRL generally mirrors the representation and unfair labor practice provisions of the NLRA. Its stated purpose is to "provide tribal employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between the Tribe as an employer and tribal employees, and to promote the health, safety, political integrity and economic security of the Tribe." The MPLRL provides for union recognition through a secret ballot election as an exclusive collective bargaining representative, and enumerates a variety of "Prohibited Practices" that generally mirror the provisions of Sections 8(a) and 8(b) of the NLRA. It also provides for the following: direct dealing with union-represented employees to remedy grievances; restrictions on union picketing; withdrawal of recognition from unions that commit prohibited practices; awarding attorneys' fees and costs against employees for advancing frivolous claims; no bargaining obligation regarding union security clauses, the enforcement of tribal rules and regulations, and certain other terms and conditions of employment; no strikes or lockouts, with mandatory submission of contract disputes to binding arbitration; unit appropriateness determinations made in consideration of "[p]rinciples of efficient administration of the tribal government"; and the right to exclude union business agents from tribal land if he or she is deemed by MEROC to be of "questionable moral character". Since MEROC has not yet been established, the MPLRL provides for the Tribal Court to appoint a "Special Master" to "assume the responsibilities and duties of the MERO Commission" in processing petitions and resolving Prohibited Practices. If the union or Tribe is not satisfied with the impartiality of the appointed Special Master, they may

appeal the appointment to the Tribal Court, which, after a hearing, will either let the appointment stand or appoint a replacement Special Master. All rulings of the Special Master or MEROC may be appealed to the Tribal Court.

In Case No. 34-RC-2230, the Tribe's General Counsel sent the petitioner therein a letter dated October 3, 2007, requesting that the petition be withdrawn and that the petitioner therein comply with the processes as set forth in the MPLRL. The petitioner therein declined the request. There is no evidence or claim that a similar letter was sent to the Petitioner in the instant case. At the hearing, however, the Employer's counsel "invite[d] the Union to proceed under [MPLRL] to seek certification as a representative under [MPLRL]."

II. ANALYSIS AND CONCLUSION

In *San Manuel*, the Board adopted a new standard for determining whether it has jurisdiction over enterprises operated on tribal land by Native American Tribes. The Board initially noted that "statutes of 'general application' apply to the conduct and operation, not only of individual Indians, but also of Indian tribes." *Id.* at 1059, citing *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) (assertion of eminent domain over tribal lands under same terms as non-Indian owned land appropriate where Congress has not expressly carved out an exemption for Indians). The Board then concluded that because "Congress intended the Act to have the broadest possible breath permitted under the Constitution, the Act is a statute of general application." *Id.*, citing *NLRB v. Reliance Fuel Oil Corp*, 371 U.S. 224, 226 (1963).

The Board then adopted the three exceptions established in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985), for determining those circumstances under which the Act should not apply to operations on Native American tribal lands. Those exceptions are:

> (1) the law "touches exclusive rights of self-government in purely intramural matters";
>
> (2) the application of the law would abrogate treaty rights; or
>
> (3) there is "proof" in the statutory language or legislative history that Congress did not intend for the law to apply to Indian tribes.

In the event that none of the exceptions apply, the Board decided that it must also examine "whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction." *San Manuel,* supra, at 1062. The purpose of this final step, according to the Board, "is to balance the Board's interest in effectuating the policies of the Act with its desire to accommodate the unique status of Indians in our society and legal culture." *Id*.

In applying this new approach, the Board asserted jurisdiction over the San Manuel Indian Casino. It found that none of the *Coeur d'Alene* exceptions were applicable. With regard to the first exception, the Board found that the "operation of a casino is not an exercise in self-governance." *Id.* at 1063. Quoting *Coeur d'Alene*, the

Board noted that "[i]ntramural matters generally involve topics such as 'tribal membership, inheritance rules, and domestic relations.'" *Id.* Even though the casino was owned by Native Americans and operated on tribal lands, it was nonetheless deemed "a typical commercial enterprise operating in, and substantially affecting, interstate commerce." *Id.* The Board expressly rejected the argument that because the profits derived from the operation of the casino funded the tribe's intramural needs, it should, by extension, constitute an intramural matter over which the Board would be prohibited from asserting jurisdiction. The Board reasoned that such a broad interpretation of "intramural" would have the anomalous result of the exception swallowing the rule that statutes of "general application" apply to Indian tribes. As to the second exception, the Board found that it did not apply because the San Manuel tribe was not a party to a treaty with the Federal Government. The third exception was also found inapplicable because "neither the language of the Act, nor its legislative history, provides any evidence that Congress intended to exclude Indians or their commercial enterprises from the Act's jurisdiction." *Id*.

In the final step of the analysis, the Board in *San Manuel* found that policy considerations favored the exercise of discretionary jurisdiction. In this regard, it noted that the casino was "a typical commercial enterprise", employing non-Indians and catering to non-Indian customers. The Board further found that the assertion of jurisdiction would not unduly interfere with the tribe's autonomy, as "the Act would not broadly or completely define the relationship between [the tribe] and its employees. … [or] regulate intramural matters." *Id.* at 1063-64.

Based upon the foregoing and the record as a whole, I find that the Board's decision in *San Manuel* clearly requires the assertion of jurisdiction over the Employer in the instant case. More particularly, I note that the second and third *Coeur d'Alene* exceptions adopted by the Board in *San Manuel* do not preclude jurisdiction over the Employer. In this regard, the Tribe has no treaty with the Federal government, and as the Board held in *San Manuel*, "neither the language of the Act, nor its legislative history, provides any evidence that Congress intended to exclude Indians or their commercial enterprises from the Act's jurisdiction." *Id.* at 1063.

Thus, the only exception that could preclude the exercise of jurisdiction in the instant case is the first, i.e., that the application of the NLRA to the Tribe "touches exclusive rights of self-government in purely intramural matters". As further discussed below, the instant case, like *San Manuel,* involves a Native American tribe operating a commercial casino on tribal lands substantially affecting interstate commerce. The casino here, as in *San Manuel*, overwhelmingly employs non-tribal members and caters to an overwhelmingly non-tribal customer base. Although the Tribe in the instant case has enacted its own labor relations rules and regulations, so too did the tribe in *San Manuel*. Given the strikingly similar nature of the casino operations and Tribal laws in the instant case with those in *San Manuel*, I see no basis for departing from the Board's conclusion in *San Manuel* that such "tribe-run business enterprises acting in interstate commerce do not fall under the 'self-governance' exception to the rule that general statutes apply to Indian Tribes". *San Manuel,* supra at 1063 (quoting *Florida Paraplegic Assn. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1129 (11th Cir. 1999).

Having determined that none of the *Couer d'Alene* exceptions preclude the Board's jurisdiction in the instant case, it is necessary to determine "whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction." *San Manuel,* supra, at 1062. In this regard, the only factor militating against the assertion of jurisdiction is that Foxwoods is located on Tribal land. Militating in favor of exercising jurisdiction is the undisputed fact that Foxwoods is an exclusively commercial venture generating enormous income for the Tribe almost exclusively from the general public who are not Tribal members. Moreover, Foxwoods competes in the same commercial arena with other non-Tribal casinos, overwhelmingly employs non-Tribal members, and actively markets its gaming, hotels, restaurants, entertainment, and other retail ventures to the general public. Based on the above, I find that the on-reservation location of Foxwoods is insufficient to outweigh the compelling policy considerations favoring the assertion of the Board's discretionary jurisdiction in the instant case.

In reaching this conclusion, I have fully considered but find no merit to the Employer's claim that its "inherent authority" to regulate employment and labor

relations on its Tribal lands precludes the exercise of the Board's jurisdiction in the instant matter. In support of this claim, the Employer cites *Montana v. United States,* 450 U.S. 544 (1981), where the Supreme Court determined that an Indian tribe was not authorized to regulate the hunting and fishing rights of non-Indians on tribal lands owned by non-Indians. In reaching that determination, the Court acknowledged that "… Indian tribes have lost many of the attributes of sovereignty" as a function of their "incorporation into the United States as well as through specific treaties and statutes". *Id.* at 563. In discussing those types of affairs that implicate "inherent sovereignty", the Court referenced "the inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members", and that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 564. In evaluating what is necessary to protect tribal self-government or to control internal relations, the Court acknowledged that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases or other arrangements." *Id*. at 565. It further acknowledged that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some *direct* effect on the political integrity, the economic security, or health and welfare of the tribe." *Id.* at 566 (emphasis added).

The Employer seizes on the Court's reference in *Montana* to a "consensual relationship" and the "threat of direct effect on the political integrity, economic security or health and welfare" of the Tribe in support of its assertion that the Board is precluded from exercising its jurisdiction in the instant matter. In further support of this assertion, the Employer cites *McArthur v. San Juan County*, 497 F.3d 1057, 1071 (10th Cir. 2007) and *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). *McArthur* involved a tribe's attempt to seek court enforcement of an injunction it issued with regard to certain tribal members who were employed by a clinic run by the county that was located on tribal land. *Strate* involved a tribe's authority to entertain civil

jurisdiction over an automobile accident that occurred on tribal land involving a vehicle driven by an employee of an employer who had a contract with the tribe to provide services to the tribe on tribal land.

Neither *Montana, McArthur* or *Strate* support the Employer's assertion that its "inherent authority" to regulate employment and labor relations on its Tribal lands precludes the exercise of the Board's jurisdiction in the instant matter. In this regard, the "consensual relationships" referenced by the Court in *Montana* on their face apply to the "commercial" relationships arising out of businesses that operate on tribal lands through contractual relationships with the tribe. There is no support in *Montana, McArthur*, *Strate* or any other case cited by the Employer for its assertion that its relationship with Foxwoods' employees is "consensual" within the meaning of *Montana* merely because such "non-Indian" employees have voluntarily come onto its reservation to accept employment. Indeed, there is no evidence that Foxwoods' employees have any type of contractual relationship with the Employer within the meaning of *Montana, McArthur* and *Strate*.

I also find no support in *Montana* for the Employer's assertion that its employee's exercise of their union and other protected concerted activities outside the confines of the MPLRL would directly threaten its political or economic security. In this regard, I note initially that the instant Petition does not involve tribal members, and that my decision herein does not address or implicate the Agency's jurisdiction over such individuals. I further note that the Second Circuit in *Reich v. Mashantucket Sand & Gravel, supra*, specifically addressed the Tribe's similar assertion that the application of OSHA to a tribal run commercial business on tribal lands would adversely affect tribal governance. The Second Circuit specifically noted that "[t]he question is not whether the statute affects tribal self-governance *in general*, but rather whether it affects tribal self-governance *in purely intramural matters"* (emphasis in original). As noted in detail above, the Tribe's regulation of labor and employment involving non-Tribal members employed at Foxwoods is not the type of "purely intramural matters" that would preclude the Board's jurisdiction in this case.

In addition, the D.C. Circuit, in affirming the Board's decision in *San Manuel*, specifically rejected a similar contention proffered by the employer in that case:

> Many activities of a tribal government fall somewhere between a purely intramural act of reservation governance and an off-reservation commercial enterprise. In such a case, the "inquiry [as to whether a general law inappropriately impairs tribal sovereignty] is not dependent on mechanical or absolute conceptions of … tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *White Mountain Apache Tribe*, 448 U.S. at 145, 100 S.Ct. 2578. The determinative consideration appears to be the extent to which application of the general law will constrain the tribe with respect to its governmental functions. If such constraint will occur, then tribal sovereignty is at risk and a clear expression of Congressional intent is necessary. Conversely, if the general law relates only to the extra-governmental activities of the tribe, and in particular activities involving non-Indians, *see generally Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 180-181 (2nd Cir. 1996)('[E]mployment of non-Indians weighs heavily against [a] claim that … activities affect rights of self-governance in purely intramural matters'), then application of the law might not impinge on tribal sovereignty. *Of course it can be argued any activity of a tribal government is by definition 'governmental,' and even more so an activity aimed at raising revenue that will fund governmental functions. Here, though, we use the term 'governmental' in a restrictive sense to distinguish between the traditional acts governments perform and collateral activities that, though perhaps in some way related to the foregoing, lie outside their scope.*

San Manuel Indian Bingo and Casino v. N.L.R.B., supra, 475 F.3d 1306 at 1313 (emphasis added).

In view of the foregoing, I find that the incidental affects on Tribal government that could potentially occur as a result of the application of the NLRA to Foxwoods' employees, which the Employer claims would directly threaten the Tribe's political or economic security, are insufficient to deny the exercise of the Board's jurisdiction herein. In this regard, the right to strike, the duty to bargain over mandatory subjects of bargaining, access by union agents, and the potential conflicts between collective bargaining and the Tribe's regulation of gaming activities, its Indian Preference Policy, and the tribal electoral process, are far too tenuous and speculative in nature to support the Employer's claims. Moreover, as noted by the Board in *San Manuel*, "[t]he Act does not dictate any terms of any agreement or even that an agreement be reached. The Board will treat the [tribe] just as it treats any other private sector employer." *San Manuel,* supra at 1064.

I find particularly unpersuasive the Employer's claim, supported solely by evidence of its unusual debt structure, that a strike against Foxwoods would

effectively prevent the Tribe from providing its "essential" government services. [10][10] In this regard, at various points in its post-hearing brief, the Employer claims that because only a "fraction" of the revenue from Foxwoods is available to the Tribe, a strike at Foxwoods would cause a "severe detrimental impact" and a "severe inhibition" on the provision of government services; would "have the effect of shutting down essential governmental services"; and "would have an immediate and devastating impact on the provision of services by the Nation". The record evidence, however, does not support the claim that only a "fraction" of Foxwoods' revenues flow to the Tribe, nor does the record support the Employer's claims of draconian impact from a strike. In this regard, it is undisputed that the Employer has annual gross revenues in excess of $1 billion. However, although approximately 98% of the Tribe's revenues are derived from the operation of Foxwoods, the record fails to indicate the dollar amount of this distribution. Although the record also reveals the aggregate principal amount of debt (i.e., approximately $1.36 billion) that must be paid from the revenues generated by the operation of Foxwoods prior to the Tribe's receipt of its revenues, there is no evidence concerning the terms and conditions of such debt payments, including monthly or annual payment amounts, the projected payback period of such debt, or whether any of the "waterfall" accounts maintain any balance after they distribute their required payments. There is also no evidence showing the amount of money that goes towards the payment of Foxwoods' operating expenses or that is forwarded to the State of Connecticut. More significantly, the record does not reflect the amount of money needed by the Tribe to fund any of its "essential" services, nor does it reflect the amount of money that annually flows to the Tribe from the Employer's operations after the "waterfall" debt payments and the payment of operating expenses and to the State of Connecticut. Moreover, the record does not indicate the Tribe's capital reserves, or the total amount of money it receives from all other sources besides Foxwoods, including the Tribe's non-gaming enterprises, commercial

[10][10] The Employer lists the Tribe's "essential" services as including a Police Department, Fire Department, Utilities Department, a Waste Water Treatment facility, Public Works Department, Education Department, and other similar services.

properties, health benefit administration services, and taxes. [11][11] Therefore, even if the Employer were to face a protracted strike, there is insufficient evidence to establish that it would lack sufficient revenues and/or capital to provide the Tribe's 900 members, as well as employees and other visitors to the reservation, with any "essential" public services. Finally, the effect of a potential strike upon the Employer's operations is highly speculative, as the length or degree of participation and the ability to obtain any necessary replacements cannot be projected.

I also find no merit to the Employer's claim that its immunity from lawsuits cannot be reconciled with its potential exposure to Section 301 suits should the NLRA apply to its operations. In this regard, an Indian tribe is at liberty to enter into contracts that waive or retain its immunity from suit, particularly where such contracts provide for court-enforceable arbitration mechanisms for resolving contractual disputes. *C&L Enterprises, Inc. v. Citizen Band Powawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 420 (2001). Moreover, the instant case deals solely with the Board's jurisdiction over the Employer and is not intended to address other provisions of the NLRA. In addition, those cases cited by the Employer in support of its immunity claim involving private lawsuits (even though those lawsuits may have been based on statutory claims) are inapposite and distinguishable from cases such as this, which involve the application of Federal law by a Federal agency. As the Board stated in *San Manuel*:

> Indian tribes have no sovereign immunity against the United States. See *Florida Paraplegic Assn. v. Miccosukee Tribe of Indians of Florida,* 166 F.3d at 1135 (immunity doctrines do not apply to the Federal Government); *Mashantucket Sand & Gravel*, 95 F.3d at 182 ("tribal sovereignty does not extend to prevent the federal government from

---

[11][11] Thus, the Employer is incorrect in its assertion at footnote 6 of its post-hearing brief that the remaining "one to two percent of the government's budget is funded by a combination of federal grants and from taxes imposed pursuant to Title XVI of the Tribal Laws". Moreover, the Tribe's ability to impose and directly collect sales taxes on certain business operations on the Tribal reservation, including hotels, food and beverage, retail, and admissions, along with a property tax on Tribal "homeowners", provides a potentially vast amount of income for the provision of government services that does not appear to pass through the "waterfall" operation described above. The ability to raise additional Tribal revenue by raising existing taxes and imposing new taxes further diminishes the Employer's claim that a strike at Foxwoods would effectively prevent the Tribe from providing "essential" government services to its Tribal members, employees and other visitors to the reservation.

exercising its superior sovereign power"). The Board is an arm of the U.S. Government.

San Manuel, supra at 1061.

Finally, the Employer's request that the Board "defer" its jurisdiction in this case in order to follow the policy articulated by other branches of the United States Government of "supporting tribal self-government and self-determination" is also unavailing. In this regard, the Employer claims, inter alia, that because the Tribe has developed a comprehensive set of labor relations and employment policies, including the MPLRL, such policies have now become a part of Tribal law that would be improperly infringed by the application of the NLRA to Foxwoods. Contrary to the Employer's claim, Congress conferred on the Board, subject to limited judicial review, "the authority to develop and apply fundamental national labor policy". *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500 (1978). Moreover, none of the cases cited by the Employer in support of its deferral request deal with a Federal agency's deferral of its proceedings to a tribal proceeding, nor do any of those cases support the inference that Federal agencies must defer to any matter covered by tribal law. [12][12] To the contrary, at best those cases merely support the general requirement of exhaustion of tribal remedies before certain legal proceedings may be decided in Federal court. In contrast, the Employer in the instant case seeks final and binding deference to its tribal labor relations laws, rather than the exhaustion of tribal remedies prior to the application of the NLRA to Foxwoods. Accordingly, I find no basis to "defer" the Board's assertion of jurisdiction in this matter.

In light of the foregoing, I find that it will effectuate the policies of the Act to assert jurisdiction herein.

---

[12][12] The only case cited by the Employer that involved the NLRA arguably reinforces the Board's supremacy over tribal enactments implicating the Act. In *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002), which dealt with a tribe's right to enact a "right to work" ordinance pursuant to Section 14(b) of the Act, the court specifically noted that the tribe therein "does not challenge the supremacy of federal law. The ordinance, as amended, does not attempt to nullify the NLRA or any other provision of federal law. The suggestion that tribes, including those that have already enacted right-to-work laws [footnote omitted] might 'enact ordinances allowing precisely what generally applicable federal law prohibits' [footnote omitted] finds no support in this record." In contrast, as the Employer admits, the MPLRL contains numerous provisions that are contrary to the NLRA.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees in the engineering, facilities, projects, interior landscaping and engineering apprenticeship departments employed by the Employer at its Foxwoods Resort Casino; but excluding office clerical employees, and guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate herein at the time and place set forth in the notices of election to be issued subsequently.

Eligible to vote: those employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were in the military services of the United States, ill, on vacation, or temporarily laid off; and employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements.

Ineligible to vote: employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the strike's commencement and who have not been rehired or reinstated before the election date: and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

The eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by International Union of Operating Engineers, Local 30, AFL-CIO.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, an eligibility list containing the *full* names

and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103, on or before April 8, 2008. No extension of time to file these lists shall be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570, or electronically pursuant to the guidance that can be found under "E-gov" on the Board's web site at www.nlrb.gov. This request must be received by the Board in Washington by April 15, 2008.

Dated at Hartford, Connecticut this 1st day of April, 2008.

/s/ Peter B. Hoffman
Peter B. Hoffman, Regional Director
National Labor Relations Board
Region 34